(2)

No. 91-1727

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DENNIS G. BEZANSON,
TRUSTEE FOR MEDOMAK CANNING COMPANY, INC.,
Petitioner,

v.

METROPOLITAN INSURANCE AND ANNUITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

RESPONDENT METROPOLITAN INSURANCE AND ANNUITY COMPANY'S BRIEF IN OPPOSITION

WILLIAM J. TOPPETA
Counsel of Record
DAVID J. LARKIN, JR.
SHERRY S. LAIRD
One Madison Avenue
New York, New York 10010
(212) 578-3317
Counsel for Respondent Metropolitan Insurance and Annuity Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Should this Court revisit the *Erie* doctrine to determine whether the First Circuit Court of Appeals incorrectly applied federal common law to a diversity action when in fact the First Circuit applied Maine law—the law of the forum state—as the *Erie* doctrine requires?

2. Should this Court vacate and remand to the Court of Appeals to consider whether a question should be certified to the Supreme Judicial Court of Maine when the Court of Appeals has properly exercised its discretion to deny the certification of such a question?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	v
STATEMENT OF THE CASE	1
REASONS THE PETITION SHOULD BE DENIED	5
I. THE COURT OF APPEALS CONDUCTED A *DE NOVO* REVIEW OF THE DISTRICT COURT'S JUDGMENT, PURSUANT TO THIS COURT'S DECISION IN *SALVE REGINA*, AND BASED ITS JUDGMENT ON SETTLED MAINE LAW, PURSUANT TO THIS COURT'S DECISION IN *ERIE*	5
II. AS THE COURT OF APPEALS BASED ITS DECISION ON MAINE LAW, THERE WAS NO REASON FOR USE OF THE CERTIFICATION PROCEDURE	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Bezanson v. Metropolitan Insurance and Annuity Company, 952 F.2d 1 (1st Cir. 1991) 1
Erie Rail Co. v. Tompkins, 304 U.S. 64 (1938) 2, 5, 9, 10, 13
Lehman Bros. v. Schein, 416 U.S. 386 (1974) 5, 10, 11, 12, 13
Salve Regina College v. Russell, 111 S. Ct. 1217 (1991) 5, 7, 10, 13

STATUTES

Me. Rev. Stat. Ann. tit. 24-A, § 2505 (1990) ..... v, 6
Me. Rev. Stat. Ann. tit. 24-A, § 2739 (1990) ..... v, 9
Me. Rev. Stat. Ann. tit. 4, § 57 (1989) 12

STATUTES INVOLVED

Me. Rev. Stat. Ann. tit. 24-A, § 2505 (1990):

Grace period

There shall be a provision that a grace period of 30 days, or, at the option of the insurer, of one month of not less than 30 days, or of 4 weeks in the case of industrial life insurance policies the premiums for which are payable more frequently than monthly, shall be allowed within which the payment of any premium after the first may be made, during which period of grace the policy shall continue in full force. The insurer may impose an interest charge not in excess of 6% per annum for the number of days of grace elapsing before the payment of the premium, and, whether or not such interest charge is imposed, if a claim arises under the policy during such period of grace the amount of any premium due or overdue, together with interest and any deferred installment of the annual premium, may be deducted from the policy proceeds. Grace shall date from the premium due date specified in the policy.

1969, c. 132, § 1, eff. Jan. 1, 1970.

Me. Rev. Stat. Ann. tit. 24-A, § 2739 (1990):

Lapse of policy, advance notice; limitation of action

No individual policy of health insurance issued or delivered in this State, except a policy which by its terms is renewable or continuable with the insurer's consent, or except a policy the premiums for which are payable monthly or at shorter intervals, shall terminate or lapse for nonpayment of any premium until the expiration of 3 months from the due date of such premium, unless the insurer, within not less than 10 nor more than 45 days prior to said due date, shall have mailed, postage prepaid, duly addressed to the insured at his last address shown by the insurer's records, a notice showing the amount of such premium and its due date. If such a notice is not so sent, the insured may pay the premium in default at any

time within such period of 3 months. The affidavit of any officer, clerk or agent of the insurer, or of any other person authorized to mail such notice, that the notice required by this section has been duly mailed by the insurer in the manner required shall be prima facie evidence that such notice was duly given. No action shall be maintained on any policy to which this section applies and which has lapsed for nonpayment of any premium unless such action is commenced within 2 years from the due date of such premium.

1939, c. 132, § 1, eff. Jan. 1, 1970.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1727

DENNIS G. BEZANSON,
TRUSTEE FOR MEDOMAK CANNING COMPANY, INC.,
Petitioner,

v.

METROPOLITAN INSURANCE AND ANNUITY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

RESPONDENT METROPOLITAN INSURANCE AND ANNUITY COMPANY'S BRIEF IN OPPOSITION

Respondent Metropolitan Insurance and Annuity Company ("MIAC")[1] respectfully requests that this Court deny the petition for writ of *certiorari*, seeking review of the First Circuit's judgment in this case. The opinion of the First Circuit is reported at 952 F.2d 1 (1991).

STATEMENT OF THE CASE

In this case, petitioner, a trustee in bankruptcy, knowingly failed to pay premiums on a life insurance policy, knowingly let it lapse, but nonetheless attempted to collect policy proceeds once the former insured had died. The Court of Appeals for the First Circuit, in reviewing the

---

[1] Rule 29.1 statement: MIAC's parent company is Metropolitan Life Insurance Company; MIAC has no subsidiaries.

decision of the United States District Court for the District of Maine in favor of petitioner *de novo*, applied Maine law, reversed, and thereby refused to allow petitioner to profit from his own procrastination. In this, his latest attempt at recovering that which is not due him, petitioner maintains that the Court of Appeals wrongly resolved the controversy by formulating and applying federal common law, when in fact the Court of Appeals applied the law of Maine, the forum state, as it should have. Petitioner asks this Court to revisit the *Erie* doctrine in order to resolve a question which is not raised by these proceedings but which is, rather, premised upon petitioner's mischaracterization of the Court of Appeals' decision. It is respectfully urged that petitioner's request should be denied by this Court.

This case involves a flexible premium life insurance policy issued by MIAC to Medomak Canning Company ("Medomak") on the life of Medomak's president, Bernard Lewis ("Lewis"), in the face amount of $500,000 (the "Policy").

On April 7, 1986, an involuntary bankruptcy petition was filed against Medomak under Chapter 7 of the Bankruptcy Code. Petitioner, Dennis G. Bezanson, was appointed Interim Trustee.

Petitioner informed MIAC that he had been appointed Interim Trustee and, at his request, MIAC promptly sent him certain information about the Policy, including projected dates for the lapse of the Policy in the event that no further premiums were paid.

The Policy provided that, in the event of a lapse, there would be a grace period of 61 days in which payment could be made in order to continue coverage under the Policy. The Policy also provided that a notice would be sent to the owner at the beginning of the grace period. The Policy was silent as to what effect the failure to send proper notice of lapse would have upon the continuation of coverage.

On or about November 7, 1988, MIAC sent a lapse notice to Medomak, addressed to Medomak's president, Lewis. The lapse notice stated that coverage under the Policy would terminate if the minimum required payment was not received by the end of the grace period, on January 5, 1989. Because the required payment was never made, the Policy lapsed as of November 5, 1988. In December, 1989, petitioner informed MIAC that Lewis had died on May 27, 1989 and demanded the face amount, $500,000, of the lapsed Policy. MIAC informed petitioner that the Policy had lapsed prior to Lewis' death.

Petitioner thereafter commenced a declaratory judgment action in the United States District Court for the District of Maine. After reviewing the stipulated record, the District Court held, *inter alia*, that, as trustee, petitioner had all the rights of ownership of the Policy P. 50),[2] including the right to receive actual (as opposed to constructive) notice of lapse (P. 51), and that since MIAC had not, in the District Court's view, given such actual notice specifically addressed *to petitioner* (it had, however, given actual notice to Medomak), MIAC was liable for the full face amount of the Policy (P. 53), even though petitioner had knowingly declined to pay Policy premiums for months.

MIAC appealed the judgment of the District Court to the United States Court of Appeals for the First Circuit. The Court of Appeals reversed, holding, *inter alia*, that the District Court had applied *inapposite* state law. (P. 32). The First Circuit then utilized those laws of the State of Maine which *it* considered to be applicable, concluding that because petitioner had failed to demonstrate his intent to continue the Policy within a reasonable period of time, the Policy had lapsed. (P. 33). Petitioner simply disputes the First Circuit's conclusion that the state law applied by the District Court was inap-

[2] All "P" references made herein are to pages of the Petition for Writ of Certiorari submitted by the petitioner to this Court.

posite. That dispute does not present the "special and important reasons" for which the discretionary writ of *certiorari* should be granted. Rule 10.1. Indeed, such a dispute may well exist every time a trial court's judgment in a party's favor is reversed, on the law, on appeal. Were there no dispute, there would also be no controversy for the courts to resolve. The fact that the Court of Appeals has now chosen one side of the dispute rather than the other, however, fails to warrant this Court's extraordinary attention.

Petitioner further maintains that the First Circuit should have certified the question of notice to the Supreme Judicial Court of Maine. Not until December 23, 1991—almost two years after commencement of the original action against MIAC in Federal Court—did petitioner suggest, *for the first time*, that such a question should be so certified, and then only upon Motion for Reconsideration and Request/Suggestion of *En Banc* Consideration [3] of the appeal petitioner had recently lost. Prior to that time, petitioner had been content to rely upon the inapposite state law which the Court of Appeals rejected.

In the end, this controversy was resolved by application of basic principles of Maine contract and statutory law. Those principles were neither uncertain nor difficult to determine. That the District Court and the Court of Appeals reached different conclusions, applying different Maine laws, does not create any greater uncertainty or difficulty than if the Court of Appeals had affirmed the District Court's judgment. It simply means that the Court of Appeals rejected the District Court's basis for decision. The fact remains that the Court of Appeals resolved *this* controversy by the application of settled *Maine* law.

---

[3] The panel which decided the appeal (Selya, *Circuit Judge* and Aldrich and Campbell, *Senior Circuit Judges*) voted unanimously to deny the motion for rehearing; and a second panel (consisting of Breyer, *Chief Judge*, Torruella, Selya, and Cyr, *Circuit Judges*) denied the suggestion for rehearing *en banc*.

REASONS THE PETITION SHOULD BE DENIED

Rule 10 of this Court permits the discretionary writ of *certiorari* to be granted "only when there are special and important reasons therefor." Petitioner, claiming a violation of the *Erie* doctrine, asks this Court to clarify (1) how courts of appeals should exercise *de novo* review of district court determinations regarding allegedly unsettled state law, and (2) on what occasions courts of appeals should be compelled to utilize certification procedures. Neither issue needs clarification beyond that given by this Court in *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), or *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (and its progeny). Moreover, even if such clarification were called for, this would be an improper case in which to provide it. Contrary to what petitioner would have this Court believe, the Court of Appeals for the First Circuit, consistent with *Salve Regina*, conducted a proper and thorough *de novo* review and based its decision squarely upon settled Maine law, as *Erie Rail Co. v. Tompkins*, 304 U.S. 64 (1938), requires. Since no violation of the *Erie* doctrine has occurred, this Court's opinion, in the context of this action, would be merely advisory.

I. THE COURT OF APPEALS CONDUCTED A *DE NOVO* REVIEW OF THE DISTRICT COURT'S JUDGMENT, PURSUANT TO THIS COURT'S DECISION IN *SALVE REGINA*, AND BASED ITS JUDGMENT ON SETTLED MAINE LAW, PURSUANT TO THIS COURT'S DECISION IN *ERIE*.

Not surprisingly, petitioner's general argument is that the District Court decided the case properly while the Court of Appeals, which reversed it, erred. Error alone, however, even if present, is not a "special or important reason[]" for granting the extraordinary writ of *certiorari*.

More specifically, petitioner contends that the District Court conducted a thorough and sophisticated review of

Maine law in considering whether petitioner had received notice sufficient to know that the Policy had lapsed. On the flip side, petitioner maintains that the Court of Appeals failed to conduct a proper *de novo* review because it peremptorily discounted the District Court's allegedly thorough and sophisticated decision, failed to predict the manner in which the issue raised by these proceedings would have been resolved by the Maine Supreme Court, and allegedly created new federal common law on the issue of lapse. Petitioner fails to explain, why, if the Court of Appeals were doing such a remarkable thing as fashioning a new federal common law of lapse, it failed to say so. One has only to read the rulings of the District Court (P. 42-53) and of the Court of Appeals (P. 25-41) to discover that petitioner's arguments grossly mischaracterize both opinions.

The Court of Appeals' reversal of the District Court's legal conclusion was not peremptory. The Court of Appeals considered (and then rejected) the District Court's reliance upon state statutes and court decisions relating to cancellation of casualty, property and accident and health policies, which it found inapposite, since the present dispute involves a *life* policy. Moreover, the Court of Appeals plainly and fully explained its conclusion that because there *is* a Maine statute which governs the lapse of *life* policies[4]—a statute *ignored* by the allegedly thorough and sophisticated District Court review—which contains *no requirement* that the notice advocated by petitioner be given, none was required under Maine law. (P. 32). Such a conclusion draws on the most elementary rules of statutory construction and suggests that an alleged lack of thoroughness and sophistication on the part of the Court of Appeals is insufficient to raise "special and important reasons" for granting a writ of *certiorari*, particularly if the "unsophisticated" conclusion happens to be correct.

---

[4] Me. Rev. Stat. Ann. tit. 24-A, § 2505 (1990).

Petitioner paradoxically claims that the Court of Appeals had no "basis for finding that the rule enunciated by the district court was inconsistent with Maine law, *despite its purported unreasonableness.*" (P. 10) (emphasis added). It is exactly that purported unreasonableness, *under Maine law*, on which the Court of Appeals based its ruling. The Court of Appeals found (as had the District Court) that the Policy was silent as to whether the failure to send a lapse notice would have the effect of extending coverage beyond the lapse date. Since no Maine statute mandated the notice petitioner claimed was required, the Court of Appeals turned to basic Maine contract law to resolve the controversy. It observed that *under Maine contract law*, when no time for performance is specified by contract, a reasonable time is implied (P. 33), and that the question of what time is reasonable is a question of law for the courts. (P. 33). The Court of Appeals then found that three times the grace period set forth in the Policy was a reasonable extension of coverage *under Maine law*, and consequently that, if no payment of premiums was made during that extended time period, the Policy would be considered to have lapsed. Because petitioner had paid no premiums within that time frame, even though he knew that the Policy required premiums to be paid or lapse would occur, the Court of Appeals concluded that the Policy had lapsed, under Maine law. It is that conclusion—not the jurisdiction from which the deciding law emanates—which stands at the center of petitioner's current arguments.

In *Salve Regina*, this Court held that "a court of appeals should review *de novo* a district court's determination of state law." 111 S. Ct. 1217, 1221. This Court pointed out that responsible appellate jurisdiction necessitates an independent review of a lower court's legal determination. *Id.* As this Court noted, "trial judges often must resolve complicated legal questions without benefit of 'extended reflection [or] extensive information.'" *Id.* (citations omitted). On the other hand,

> appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge.

Id.

That is exactly what happened in the instant case. The briefs submitted to the Court of Appeals were much more detailed than those submitted to the District Court. In particular, they analyzed whether the District Court's ruling comported with the laws of Maine. Upon review, the Court of Appeals had before it arguments concerning the District Court's reliance upon casualty insurance laws and statutes (rather than laws and statutes relating to life insurance)[5] and which state law should apply when the element of time is neither mandated by statute nor specified by contract.[6] Nothing suggests that the Court of Appeals did anything other than focus its attention on the legal issues before it, as those issues arose

---

[5] On this point, MIAC provided the Court of Appeals with applicable passages from legislative history which demonstrated a strong public policy interest on the part of the Maine legislature to ensure continued coverage under casualty insurance policies. MIAC cited Maine cases dealing with statutory construction in support of its argument that, by enacting lapse notice requirements for every type of insurance except life insurance, the Maine Legislature had made a distinction between casualty and life insurance which implied that there was no similar public policy supporting the continued coverage of a life insurance policy.

[6] As an aid to the Court of Appeals in determining a reasonable amount of time for extension of coverage under a life policy, MIAC cited (a) a Maine statute requiring that, in life insurance policies, a grace period of 30 days be allowed for the late payment of premiums, and (b) the lapse notice statutes of other states, including Maine's First Circuit sister state of Massachusetts which has enacted a statute providing that in the absence of a lapse notice, a life insurance policy will remain in force for three months after default in payment of premium.

under the laws of the State of Maine. Petitioner's arguments to the contrary are refuted by the record.

Petitioner cites several federal opinions in which it has been held that the task of federal courts sitting in diversity, when faced with an issue of state law not previously decided by the highest court of the state in which it sits, is to predict that court's decision. MIAC agrees but hastens to add that in this case the Court of Appeals not only found previously-existing state law which controlled the controversy but *did* make a prediction as to how that law would have been applied by the State of Maine *in this case*. The Court of Appeals, as petitioner concedes, predicted that Maine would have found the District Court's opinion unreasonable and three times the Policy's grace period a reasonable time within which petitioner was required to act if he did not wish the Policy to lapse. That is precisely what *Erie* and its progeny requires. In making its prediction, the Court of Appeals took into account the absence from Maine's controlling statutes of a requirement that notice of the kind advocated by petitioner be sent upon nonpayment of *life* insurance premiums, the presence of such requirements in other Maine statutes governing other types of insurance,[7] the public policy considerations supporting the penalties imposed on insurers that fail to send required lapse notices, the existence of established Maine law governing performance when no time for performance is specified by contract, and the absence of any law from other jurisdictions which supported the District Court's rulings of law.

---

[7] Indeed, as the Court of Appeals pointed out, Maine statute § 2739 "offers health insurers the right to terminate after nonpayment of the premium for *three* months, without notice, or in *one* month with notice." (P. 32) (emphasis added). If legal analysis under the law of Maine is satisfied by reaching into a grab-bag of analogous—but inapposite—statutory laws, then the District Court might just as well have plucked the three-month provision contained in § 2739 out of the air as the provisions on which it expressly relied. To have done so would have supported the same outcome reached by the Court of Appeals.

It is difficult to conceive of what the Court of Appeals might have done—short of using the phrase "we predict" —that would have shown greater compliance with the *Erie* doctrine which petitioner wrongly claims has been violated.

Petitioner nevertheless contends that the Court of Appeals, in citing virtually nothing but Maine authorities, somehow managed to transform its opinion into federal common law, in violation of *Salve Regina*. The opinions which petitioner cites as authority for that contention are entirely inapposite for the simple reason that the Court of Appeals based its decision squarely on Maine law, not federal law. At no point in the Court of Appeals' decision is federal common law mentioned or created. Indeed, the Court of Appeals' opinion—which found that the District Court had applied inapposite *Maine* law—only makes sense in light of the *Maine* law which the Court of Appeals then went on to find apposite. No basis therefore exists for granting the writ of *certiorari* petitioner has requested.

II. AS THE COURT OF APPEALS BASED ITS DECISION ON MAINE LAW, THERE WAS NO REASON FOR USE OF THE CERTIFICATION PROCEDURE.

Assuming, *arguendo*, that this Court should some day revisit the certification procedure currently governed by *Lehman Bros.*, prior precedent of the Court dictates that this case is not the case in which to do so because petitioner failed even to request certification until making his motion for rehearing in the Court of Appeals.

Chief Justice Rehnquist,[8] in his concurring opinion in *Lehman Bros.*, noted with great disapproval that it was not until *after* a district court decision in favor of the petitioners had been reversed by the court of appeals that the petitioners first requested utilization of the certifica-

[8] Then Justice Rehnquist.

tion procedure. 416 U.S. at 393. "Thus petitioners seek to upset the result of more than two years of trial and appellate litigation on the basis of a point which they first presented to the Court of Appeals upon petition for rehearing." *Id.* Under such circumstances, Chief Justice Rehnquist noted that a "determination [by the Court of Appeals] should not be disturbed simply because the certification procedure existed but was not used." *Id.* at 395. Rather, he observed that "[t]he question of whether certification on the facts of [a] case . . . would . . . advance[] the goal of correctly disposing of th[e] litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice." *Id.*

While, in *Lehman*, this Court then vacated the judgment of the Court of Appeals and remanded to it for consideration of whether a question to the Florida Supreme Court should be certified, *id.* at 392, two primary factors present in *Lehman*, but not present in the instant case, prompted that remand. First, in *Lehman*, "the Court of Appeals [sitting in New York] held that Florida law was controlling [but] found none that was decisive[,] [s]o it . . . turned to the law of other jurisdictions . . . ," primarily New York. *Id.* at 389. In the present case, the Court of Appeals based its decision squarely on Maine law. Hence, unlike the situation in *Lehman*, in which a Court of Appeals sitting in New York fashioned Florida law out of New York precedent, here, a Court of Appeals sitting within the region which includes the State of Maine applied Maine law to achieve Maine precedent.

Second, prior to *Lehman*, courts of appeals did not have the guidance which *Lehman* has subsequently provided. Here, the Court of Appeals *had* that advantage. Being the court of "initial choice," it considered whether a question should be certified to the Maine Supreme Judicial Court and, in light of *Lehman*, gave a clear answer: "No." Plaintiff presents no reason why that choice was an abuse of discretion. Indeed, the primary argument

proffered by petitioner for remanding—that the Court of Appeals erred by developing federal common law—is ill-founded. The Court of Appeals applied Maine law. It did not fashion federal common law.

The final weakness in petitioner's last-ditch effort to gain a further review is presented by petitioner's own actions. As petitioner well knows, under Maine's certification procedure courts of appeals are not the only federal tribunals which may certify questions of state law to the Maine Supreme Judicial Court. Federal district courts may do so as well. *See* Me. Rev. Stat. Ann. tit. 4, § 57 (1989). Here, however, even though petitioner *now* says that this case presents a state law issue so uncertain that it should have been certified to Maine's highest court, petitioner did not ask the District Court to certify it. Petitioner did not even ask the Court of Appeals to certify the question now so urgently pressed—*until* he had lost on appeal. Petitioner, not unlike the petitioners in *Lehman Bros.*, waited almost two years before suggesting that Maine's certification procedure must be used. Petitioner, however, quite unlike the petitioners in *Lehman*, had the benefit of *Lehman* from the outset, but chose to remain silent, just as he chose not to pay premiums on the Policy whose proceeds he now seeks to collect. Petitioner demonstrated, by the presentation of his own case, that the state-law issue whose certification he now proposes was so unimportant that he failed to raise it—until this late date. *Now* he asks the Court of Appeals be compelled to reconsider it, but the Court of Appeals, well within its exercise of sound discretion, has already said, "No." This Court should not alter that answer.

CONCLUSION

In basing its decision on settled Maine law, the Court of Appeals acted in accordance with the decisions of this Court in *Erie*, *Lehman Bros.*, and *Salve Regina*. As there is nothing special or important under Rule 10 for this Court to consider, the Petition should be denied.

Respectfully submitted,

WILLIAM J. TOPPETA
Counsel of Record
DAVID J. LARKIN, JR.
SHERRY S. LAIRD
One Madison Avenue
New York, New York 10010
(212) 578-3317
Counsel for Respondent
Metropolitan Insurance and
Annuity Company

Dated: New York, New York
May 27, 1992